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No. 312

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*In the Supreme Court of the United States*

OCTOBER TERM, 1944

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UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. I, 21-25) is reported in 101 C. Cls. 202.

## **JURISDICTION**

The judgment of the Court of Claims was entered on February 7, 1944 (R. I, 32). The motion of the United States for a new trial and for amended and additional findings of fact was overruled May 1, 1944 (R. I, 32). The petition for a writ of certiorari was filed August 1, 1944 and granted October 9, 1944 (R. I, 34). The

jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

#### QUESTION PRESENTED

The United States erected a dam in the Mississippi River in pursuance of a plan to improve navigation, thereby raising the water level in the navigable St. Croix River and reducing the water power of respondent's dam and hydroelectric plant at the mouth of the Willow River (a non-navigable tributary of the St. Croix), which drew water from the Willow River and discharged it directly into the St. Croix River about 30 miles above the Government dam. The question is whether the United States is liable as for a taking of property.

#### STATEMENT

This is a suit brought by respondent in the Court of Claims to recover just compensation for the reduction in the generating capacity of a dam as property taken by the United States. That court gave judgment for respondent in the sum of \$25,000 with interest (R. I, 32).<sup>1</sup>

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<sup>1</sup> Only part of the record has been printed. The pleadings of the parties, the findings of fact, conclusion of law and opinion of the court below, together with related papers, comprise Vol. I of the printed record, hereinafter referred to as "R. I." Certain portions of the transcript of the testimony printed by stipulation form Vol. II, hereinafter referred to as "R. II." The exhibits filed with the Court are referred to simply by name and number.

Respondent is a public utility company incorporated under the laws of Wisconsin (R. I, 19). It owns and operates a dam and a hydroelectric power plant located at the confluence of two rivers at Hudson, Wisconsin (R. I, 17, 19): the St. Croix River, a concededly navigable waterway, and the Willow River, a non-navigable tributary of the St. Croix (R. I, 23). The St. Croix, at this point, resembles a greatly elongated lake and is often referred to as Lake St. Croix (R. I, 20). The undisputed proof discloses the following facts concerning the power plant and dam:

Respondent maintains a dam (not here involved) across the Willow River approximately  $\frac{1}{2}$  to  $\frac{3}{4}$  of a mile above the natural confluence of that river with the St. Croix (R. I, 12, 16; R. II, 36, 40; Ex. 7). The effect of this dam is to pool the waters of the Willow River and to raise them 22 feet above their normal elevation (R. I, 16-17), the resulting body of water being known as Lake Mallalieu (Ex. 7).<sup>2</sup> For part of its length, this body of water is separated only by a narrow neck of land from the St. Croix, which is at a considerably lower elevation at this point than the raised pool in the Willow River (R. II, 44-45).

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<sup>2</sup> The dam was first erected as a logging dam in 1886 and was equipped with a spillway, but the spillway has not been opened for many years (R. II, 37) and the natural bed of the Willow River is now dry save to the extent that water is backed up into it from the St. Croix River.

In order to utilize the difference between the two levels of water for the production of power, respondent cut a channel through this narrow neck of land at a point where it was between 125 to 150 feet wide (R. II, 35, 40), and placed within it a dam and power house equipped with water wheels, turbines, generators and other necessary equipment for the generation of power (R. I, 17). Thus, instead of the waters of the St. Croix being separated from the Willow River by a strip of land, as formerly, the two rivers are now separated by respondent's dam and power house, whose foundations take the place of the natural bank (R. I, 4; R. II, 45-49; Exs. E-1, 22, 23, 24). Since this new outlet was made, the waters of the Willow River no longer empty into the St. Croix through the natural mouth of the river but flow through the artificial channel created by the respondent, first passing through the turbines in the power house where the mechanical energy produced by their fall is turned into electric energy. From the power house the water is discharged directly into the St. Croix River through draft tubes which carry below the surface of the latter.<sup>3</sup> A guide wall projecting

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<sup>3</sup> That the discharge ends of the draft tubes were so placed is shown by testimony that at one time of extreme low water when the ends of the draft tubes came out of the water, it was found necessary in order to secure good operation to extend them so that they would lead below the surface of the St. Croix River (R. II, 39).



out from the side of the power house approximately 34 feet into the St. Croix River, and resting on the bed of that river, further aids in the channelization of the waters upon their discharge from the power house (R. II, 38, 46; Ex. 8).

It is undisputed that the power output of a dam such as respondent's is dependent upon the height of the operating head. The operating head is the difference between the elevation of the head waters at the entrance to the turbines, here the level of the Willow River, and the elevation of the tail waters at the discharge end of the draft tubes leading from the turbines, here the level of the St. Croix River (R. II, 41). The greater the difference, the greater the power output; hence, any raising of the level of the St. Croix River at Hudson (the tail water) proportionately reduces the power head at respondent's dam and consequently its potential power production (R. II, 44-45). Respondent's dam maintained the waters of the Willow River at this point at a fairly constant level of approximately 689 feet above mean sea level, so that there was comparatively little fluctuation in the level of the head waters to affect the operating head (R. II, 44-45; Exs. 1-5, 1-6). However, prior to August 12, 1938, the effective operating head of water at respondent's dam had varied between  $22\frac{1}{2}$  feet and 8 feet with the normal fluctuations in the level of the St. Croix River (R. I, 4; R. II, 41).



On August 12, 1938, the United States, pursuant to an Act of Congress of January 21, 1927 (44 Stat. 1010, 1013), and supplemental legislation, completed a dam in the Mississippi River at Red Wing, Minnesota, approximately 30 miles below respondent's power plant (R. I, plate fol. p. 8). It is not denied that the Red Wing Dam was constructed in the exercise of the constitutional power of the United States to improve the navigability of the Mississippi and St. Croix, both navigable rivers. The dam is of the roller type of construction and may be so operated as to permit the release of any desired amount of water. Since its construction, its operation has, with some exceptions, raised the level of the St. Croix River at respondent's plant to a height of 675.3 feet above mean sea level. When the level exceeds 675 feet at Red Wing (approximately 675.3 at Hudson), the dam is rolled up and the river allowed to flow as in a state of nature (R. I, 10, 11, 20).

The Red Wing Dam, by preventing the St. Croix River from falling below 675 feet above mean sea level, makes 14 feet the maximum operating head obtainable at respondent's dam. In order to supply the resulting deficiency in the generating capacity of its dam, respondent entered into a contract to purchase electric current from the Northern States Power Company for resale. The transmission line built to carry the

purchased current cost \$21,000 (R. I, 21). Respondent thereupon brought suit in the Court of Claims to recover compensation for the reduction in the operating head of its dam from the 22.5 feet theretofore available at low water stages of the St. Croix River to 13½ feet, and for the consequent reduction in generating capacity (R. I, 4). At the trial of the cause, however, respondent limited its claim to compensation to the 3 feet by which the head had been diminished in raising the level of the St. Croix from 672 feet, ordinary high water mark according to respondent, to 675 feet. (See Brief in Opp. to Pet. for Cert., pp. 4-5.) The Court of Claims held that the Government "had a right to raise the level of the [St. Croix] river to ordinary high-water mark with impunity, but it is liable for the taking or deprivation of such property rights as may have resulted from raising the level beyond that point" (R. I, 23-24), and found that the Government had raised the level of the St. Croix River 3 feet above ordinary high water mark and that the value of the resulting loss of power was \$25,000 (R. I, 21). Judgment was entered for that amount, plus interest (R. I, 32).

#### SUMMARY OF ARGUMENT

##### I

A riparian owner has no property right as against the Government in the water power to be derived from the difference in level between a

non-navigable and a navigable stream. The Court of Claims erred, therefore, in awarding compensation to respondent for the loss of water power at its hydroelectric facilities caused by an alteration in the level of a navigable stream consequent upon the Government's improvement of navigation. Since respondent had no property right in the level of such a stream, it is immaterial to its right of recovery whether the alteration in its level extended up to or beyond ordinary high water mark.

*United States v. Cress*, 243 U. S. 316, is inapplicable because the claim there was based upon a change in the level of a non-navigable stream, whereas here the level only of the navigable river was raised. That case, if still law, would at most support the right of a riparian owner on a non-navigable stream to have the water of the stream flow from his land as in a state of nature; it does not conflict with the decisions of this Court which deny any such right to a riparian owner on a navigable stream. To grant compensation for the destruction of the generating power of respondent's plant by the Government's change in the level of a navigable stream would place respondent in a more favored position than the owners of structures erected in the bed of a navigable stream, which are uniformly held to be completely subject to the Government's power over navigation. Respondent employed the level of

the navigable stream, as other riparian owners employ the bed, at the risk of loss of its benefits.

## II

Even if the Government's project be deemed to interfere with the flow of the Willow River, a nonnavigable tributary of the navigable St. Croix, the only interference is with the discharge of the former into the latter. To hold such interference compensable because of the nonnavigable character of the tributary, places a restriction upon the federal power to improve navigation which no case has thus far recognized. The *Cress* case, which involved such a situation, did not pass on this question, and the award of compensation made in that case was based upon a theory of rights in the level of even a navigable stream which was subsequently rejected by this Court in *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592. The federal power over navigation embraces not only the right to change the flow of a navigable river; but also whatever control of its nonnavigable tributaries or portions may be necessary for such purpose. Cf. *Oklahoma v. Atkinson Co.*, 313 U. S. 508; *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690. The paramount public interest in navigation does not begin at the head of navigation; it extends to the waters which feed

the navigable river. Hence the use of such waters immediately above, as well as below, the head of navigation should equally be subject to the power of the Government to diminish its value through an improvement in navigability.

### III

In any event, the incidental impairment of the power potential of a dam 30 miles away from the Government's project is not a "taking" under the Fifth Amendment, but is mere consequential damage. To the extent that *United States v. Cress* allowed recovery in a parallel situation, it departed from the principles consistently given effect by this Court, under which compensation has been denied for damages at least as direct as the impairment of respondent's water power caused by the building of a distant Government dam. Cf., e. g., *Gibson v. United States*, 166 U. S. 269.

### ARGUMENT

#### I

**THE UNITED STATES IS NOT LIABLE FOR LOSS OF WATER POWER RESULTING FROM ITS RAISING THE LEVEL OF A NAVIGABLE STREAM**

Respondent's claim rests on an impairment of the water power value of its dam caused by a rise in the level of the navigable St. Croix River as a result of a federal improvement in

that stream's navigability. A loss of value so dependent on the level of a navigable stream is not required to be compensated under the Fifth Amendment as a taking of private property.

It is well settled that there can be no private property rights in the flow of a navigable stream as against the paramount right of the United States to improve navigation. Thus while just compensation is properly payable for the flooding of fast lands as a result of navigational improvements in a navigable river, no compensation whatever will be awarded to the "riparian owners of the shore and appurtenant submerged lands" for the value of the "rapids and falls" and the consequent water power. *United States v. Chandler Dunbar Co.*, 229 U. S. 53. And in sustaining the power of the Federal Government to impose such conditions as it chose upon the privilege of erecting a dam in a navigable river, this Court has observed (*United States v. Appalachian Power Co.*, 311 U. S. 377, 424):

The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.

Application of these principles has resulted in the denial of compensation for the power site value of lands taken in condemnation proceedings on the ground that a riparian owner has no property right as against the United States in the use of the navigable waters, or the power inherent therein, or in the fall or flow of the water for commercial purposes. *Continental Land Co. v. United States*, 88 F. (2d) 104, 109 (C. C. A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co. v. United States*, 135 F. (2d) 541, 543 (C. C. A. 9), certiorari denied, 320 U. S. 747. Compensation has likewise been refused for the impairment of the operating head of a dam in a navigable stream. *Barnes v. United States*, 46 C. Cls. 7; *Hood v. United States*, 46 C. Cls. 30, 49 C. Cls. 669; see *Coleman v. United States*, 181 Fed. 599, 601 (C. C. N. D. Ala.).

Mereover, compensation has repeatedly been denied for damage which is more material than the loss of water power, such as the destruction of privately owned levees and the recurrent flooding of private land due to the construction of levees by the Government which confined the waters of the Mississippi and raised their level (*Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24; *Cubbins v. Mississippi River Commission*, 241 U. S. 351; *Franklin v. United States*, 101 F. (2d) 459 (C. C. A. 6), affirmed on other grounds, 308 U. S. 516);



erosion of land bordering the Mississippi caused by revetments built by the Government for the purpose of stabilizing the channel (*Bedford v. United States*, 192 U. S. 217); interfering with a riparian owner's access to land by concentrating the flow of a river with the aid of a dyke (*Gibson v. United States*, 166 U. S. 269); impairing the drainage of lands by changing the flow of a river into which they drain (*Mills v. United States*, 46 Fed. 738 (S. D. Ga.); *Lynn v. United States*, 110 F. (2d) 586 (C. C. A. 5)); and increasing the likelihood of intermittent flooding by altering the level or natural flow of a stream (*Christman v. United States*, 74 F. (2d) 112 (C. C. A. 7); *Walls v. United States*, 44 C. Cls. 482; *Tompkins v. United States*, 45 C. Cls. 66).

This body of authority is fatal to respondent's asserted right to have the waters of the St. Croix flow away from its lands at a height no greater than ordinary high water. Since respondent has no property right in the flow of the St. Croix as against the paramount power of the Government, it is immaterial whether the alteration in such flow extended up to, or beyond, ordinary high water mark. The significance of ordinary high water mark is that it bounds the bed of the river; land situated above ordinary high water mark is fast land, for whose invasion compensation must be paid, while land situated below is subject to the dominant power of the Federal Government and no compensation need be paid

for its flooding. *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592; *Willink v. United States*, 240 U. S. 572, 580; *United States v. Meyer*, 113 F. (2d) 387, 398 (C. C. A. 7), certiorari denied, 311 U. S. 707; *Marrett v. United States*, 82 C. Cls. 1, 13, certiorari denied, 299 U. S. 545; *Barr v. Spalding*, 46 F. (2d) 798, 800 (W. D. Ky.). But ordinary high water mark has no relevancy where the damages complained of are changes in the flow of the river, not the flooding of land.<sup>4</sup> Unlike fast land, the flow of the river is at all times subject to the servitude in respect of navigation created by the Constitution in favor of the Federal Government. See *Scranton v. Wheeler*, 179 U. S. 141, 163.

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<sup>4</sup> Here respondent made no claim in its petition in the court below that raising of the water level of the St. Croix River flooded its fast lands or caused any physical injury to its power plant (R. I, 3-8), and while the respondent's reply alleged that it had been ousted from the use and enjoyment of fast lands (R. I, 18), no proof whatever was submitted on this point. The court below made no finding that there was any invasion of fast lands or any injury to respondent's property, other than the loss of water power, and the judgment is predicated entirely upon the loss in water power. It is true that an increase in the level of the St. Croix River necessarily raises the water along the banks on both sides, but it does not follow that there was resulting injury to physical property. Indeed, the evidence shows that respondent's plant had been constructed so that it could be operated even when the St. Croix was at a level of 681 feet above mean sea level (R. II, 41). Thus the government in stabilizing the level permanently at 675 feet did not interfere with the operation of the power plant.

Therefore, regardless of the extent in the alteration of such flow, whether extending above or below ordinary high water mark (cf. *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592), there can be no liability predicated on such interference alone. Compensation is due only for whatever damages may be done property not subject to any servitude in the interest of navigation, such as fast land (*United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 60; *Continental Land Co. v. United States*, 88 F. (2d) 104 (C. C. A. 9), certiorari denied, 302 U. S. 715), or structures erected above high water. *Hood v. United States*, 49 C. Cls. 669, 680.<sup>5</sup>

Under these decisions, respondent plainly had no property rights in the flow of the navigable St. Croix, as against the Federal Government's constitutional powers to improve navigation, which would sustain an award of compensation for the loss in water power due to the alteration in the river's level. But the Court of Claims dis-

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<sup>5</sup> Intangible riparian rights such as the right to the flow of a stream in its natural condition, or the right to subsurface drainage (*United States v. Meyer*, 113 F. (2d) 387 (C. C. A. 7); *Lynn v. United States*, 110 F. (2d) 586 (C. C. A. 5)) or the right of access to the waters (*Scranton v. Wheeler*, 179 U. S. 141; *Gibson v. United States*, 166 U. S. 269), are subject to the same servitude in the interests of navigation of the stream as is the bed of the stream, and nothing is due for their impairment by the United States in the exercise of its paramount authority.

regarded these authorities, stating that it had "no option but to follow" *United States v. Cress*, 243 U. S. 316, because "the facts of that case \* \* \* are identical with the facts here" (R. I, 25). This ~~overlooked a~~ crucial distinction between the cases: the claim in the *Cress* case<sup>\*</sup> was based upon the rise in the level of a non-navigable stream, whereas the instant claim relates to the raising of a navigable river.

As here, the plaintiff in the *Cress* case owned a dam located in a non-navigable tributary of a navigable waterway (the Kentucky River). Also as here, the Government constructed a dam in the navigable stream. But there, the Government's dam raised the level of the *non-navigable* tributary below petitioner's dam to such a level as to deprive the plaintiff's dam of all value as a source of power. This Court held the United States liable for the depreciation in the value of the mill property as a result of the destruction of the water power. The basis of recovery was that under the laws of Kentucky, the riparian owner owned the bed of the stream and had "as an inseparable part of the land" the "right to have the water flow away from the mill dam unobstructed, except as in the course of nature."

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<sup>\*</sup> The opinion entitled "*United States v. Cress*" also deals with the companion case of *United States v. Kelly*, No. 718, and it is with the holding in the latter case (243 U. S. at 329-330) that we are here concerned.

A destruction of this right by raising the water level of the non-navigable stream was held to be "a taking of a part of the land" (243 U. S. at 330). Here, however, the diminution in the generating capacity of respondent's plant is due solely to the rise in the level of the navigable St. Croix River into which the draft tubes discharge (see pp. 4-7, *supra*), and the Court of Claims expressly found that the levels of the non-navigable Willow River had not been affected by the Red Wing Dam (*Id.* 5, R. I, 20).<sup>1</sup> The right to compensation for interference with the flow of a non-navigable stream because the riparian owner had a right to have the waters flow from his land as in a state of nature, upheld in the *Cress* case, constitutes no authority for such a right in the flow of a navigable river where the flow of the non-navigable stream is not altered. This is in-

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<sup>1</sup> The court below referred to the water level of the St. Croix River as "raised and backed up into plaintiff's tailrace" (R. I. 22). It is clear, however, that this did not imply a raising of the level in anything but the St. Croix River. This is to be seen from the specific finding that the Red Wing Dam "did not affect the levels of Willow River" (R. I, 20), and the evidence showing that the dam and power house form part of the banks of the St. Croix, replacing the natural bank of land excavated by respondent (see p. 4, *supra*). The tailrace of the plant is the St. Croix River itself, the guide wall which defines such tailrace resting on the bed of the St. Croix. If the level of such tailrace has been raised, it is because it is part of the St. Croix, and when the level of the latter was raised, the level of the tailrace rose with it.

deed implicitly recognized by the decision below, holding the government liable only to the extent that it raised the level of the St. Croix above its ordinary high-water level, and indicating that the government would have incurred no liability if its interference with the natural flow had stopped at ordinary high water mark (R. I, 23-24). If respondent was entitled to the flow of the St. Croix as in a state of nature, as was the plaintiff in the *Cress* case, the government would be liable for all the damage consequent upon changing that flow from what it previously was.

Moreover, the *Cress* case was based on the absolute right of the riparian owner under Kentucky law to have the water of a nonnavigable stream flow from his land as in a state of nature.<sup>8</sup> Under the laws of Kentucky (*Barr v. Spalding*, 46 F. (2d) 798, 799 (W. D. Ky.)), as well as of Wisconsin (*Fox River Paper Co. v. R. R. Comm.*, 274 U. S. 651) no such unqualified property right inheres in the owner of property bordering a navigable river. Such owner takes subject to "the right of the public to regulate, control and direct the flow" of the stream in the interest of navigation. *Wisconsin River Improvement Co.*

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<sup>8</sup> "Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself" and includes "the right to have the water flow away from the mill dam unobstructed." *United States v. Cress*, 243 U. S. 316, 330.

v. *Lyons*, 30 Wis. 61, 65; *S. S. Kresge Co. v. Railroad Commission*, 204 Wis. 479. Since his rights are subject to the public easement or servitude of navigation, he cannot complain of interference with the use of his water and the diminution of the water power derived therefrom by a dam whose construction is authorized by the state. *Falls Mfg. Co. v. Oconto River Improvement Co.*, 87 Wis. 134. Accord: *Rundel v. Delaware & Raritan Canal Co.*, 14 How. 80. Respondent, therefore, does not have the unqualified right under state law upon which the *Cress* case based the award of compensation.

There is an even more cogent reason for the inapplicability of the *Cress* case here. There, the plaintiff's mill, dam, and other equipment were located entirely within a non-navigable stream, and the power potential depended solely upon the flow of that stream. Here, however, respondent has deliberately made the power potential of his plant dependent upon the maintenance of the level of the navigable St. Croix. By diverting the waters of the Willow River from their natural bed, raising them to an artificial height, and then emptying them into the St. Croix at a lower level through a manufactured outlet, respondent created a source of power which derived its energy from the difference between the level of the impounded waters of the Willow River and the natural level



of the St. Croix. By thus incorporating the water level of a navigable stream into the design of its plant, the respondent assumed the risk, as do all riparian users of the flow of a navigable stream, that the Government, pursuant to its dominant power over such streams, might impair the use of the stream. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53; *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251; *Union Bridge Co. v. United States*, 204 U. S. 364, 400.

The situation would seem to be at least as unfavorable to respondent's claim as that involved where structures are placed in the bed of a navigable stream. Respondent is not seeking to recover for the damage done to the physical structures which it constructed on the bed of the Willow and St. Croix Rivers,<sup>9</sup> but is seeking compensation for loss of the intangible force generated by equipment which includes those structures,—a force which is the product of the difference in levels between water respondent has pooled and the level of a navigable stream. The owners of structures in the bed of a navigable

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<sup>9</sup> The evidence shows that a guide wall which channelizes the discharge of waters from the power plant was built by respondent out into the St. Croix a short distance and rested on the bed of the stream; that the foundations of the power house likewise rested on the bed of the stream; and that the draft tubes which conduct the water out of the turbines extended out into the channel of the St. Croix and were below high watermark. (See pp. 4-5, *supra*.)

river cannot recover for damage done them in the improvement of navigation. *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251; *Willink v. United States*, 240 U. S. 572; *Delaware R. Co. v. Weeks*, 293 Fed. 114, 120; cf. *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 89. This is so even where the level of the stream is raised several feet above its high water mark, and compensation is not recoverable for the damage done a structure resting on the bed of the river whether such damage results from raising the level of the stream up to high water mark or from raising it above that level. *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592. It would seem to follow that by incorporating the navigable stream itself into the design of its power plant, as an integral part thereof, respondent took the risk that the power, made dependent upon the level of a navigable waterway, "may be injured or destroyed without compensation by a federal improvement of navigable capacity." *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592, 599. Indeed, if those who employ only the bed of a navigable stream, which is capable of limited ownership,<sup>10</sup> do so at the risk of the loss of their

<sup>10</sup> *Yates v. Milwaukee*, 10 Wall. 497; *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592, 595; *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 87.

property, it would seem to follow *a fortiori* that they also assume such risk who employ the navigable stream itself, incapable as it is of being privately owned (*United States v. Chandler-Dunbar Co.*, 229 U. S. 53).

## II

### A CHANGE IN THE LEVEL OF A NON-NAVIGABLE TRIBUTARY OF A NAVIGABLE RIVER AS A CONSEQUENCE OF AN IMPROVEMENT IN NAVIGATION DOES NOT IMPAIR A COMPENSABLE INTEREST

We have thus far undertaken to show that the Government's improvement of navigation in the Mississippi River physically affected only the waters of navigable streams, *i. e.*, the Mississippi and the St. Croix Rivers; and that there was no physical interference with the waters of the non-navigable Willow River. The court below, however, thought the *Cross* case squarely applicable because the facts were identical, and in that case the Court granted compensation for interference with "the right to have the water [of a non-navigable stream] flow away from the mill dam unobstructed, except as in the course of nature \* \* \*" (243 U. S. at 330). However, if that "right" is to be recognized in the instant case, it would amount to a right in the respondent to have the waters of the non-navigable Willow River flow "as in the course of nature" into the navigable St. Croix—in short, a property right

in the St. Croix itself, since any alteration in the flow or level of the latter would affect the discharge into it of the waters of the Willow River. Such a property right in a navigable stream is denied by all the decisions, to which we have already referred.

But if it be assumed that the raising of the St. Croix constituted an interference with the non-navigable Willow River, and that the power potential of respondent's dam depended entirely on the flow of that river, it is submitted that no compensable interest has been destroyed.

This Court has recognized that the federal power to improve navigation not only includes the right to change the flow of a navigable river, but also extends to such control of its non-navigable tributaries or portions as may be necessary for such purpose. *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690; *Oklahoma v. Atkinson*, 313 U. S. 508; *United States v. Utah*, 283 U. S. 64. And while there may be a distinction between the powers of the Federal Government over the non-navigable reaches of a navigable river and its navigable portions (*United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U. S. 266, 273), no right to compensation has ever been based upon such a distinction. Nor is *United States v. Cress*, 243 U. S. 316, an exception to that statement.

In the *Cress* case, the Government, resisting the payment of compensation for the flooding of lands and the decrease in water power resulting from the raising of a non-navigable stream, contended that control of a navigable river included within it control of its tributaries and carried with it the right to raise the water in the tributary streams (243 U. S. at 319). This Court expressly declined to pass upon that contention, but assumed that the rights of riparian owners on a non-navigable tributary were no greater than upon navigable waters, and on this assumption the Court concluded that the Government was liable for any alteration in the natural flow of the navigable waters (243 U. S. at 319). Insofar as the *Cress* case held that the public right in a navigable river was limited "to the natural state of the stream" (243 U. S. at 325), it has been overruled by *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592.

In the latter case, the Government, for the purpose of improving navigation, raised the water level in a navigable stream about 7 feet above ordinary high water mark, thereby flooding embankments which the railroad company had constructed in the stream between ordinary high and ordinary low water marks, and which concededly did not constitute an obstruction to navigation. In a suit for compensation for the damage to the embankments, this Court rejected the railroad's

contention "that the power of the Government to take private lands for the improvement of navigation is confined to the natural widths, levels, and flows of the river and that if more is taken compensation must be made" (312 U. S. at 595). The *Cress* case, the Court stated (312 U. S. at 597):

\* \* \* must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion.

While the Court found it unnecessary to overrule the *Cress* case because it was factually distinguishable, it clearly departed from the rationale of that case. As limited by this decision, the *Cress* case is authoritative only insofar as it recognizes a right in the owners of land bordering the nonnavigable tributary of a navigable river to compensation for the flooding of such lands by an improvement in the main stream. Of doubtful authority at present is so much of that case as admits a right in such an owner to have the nonnavigable waters flow from his land as in a state of nature, despite the needs of the Government's project for the improvement of naviga-

tion in the main stream.<sup>11</sup> That no such right exists in the owner of land bordering a navigable river can now be considered settled beyond dispute. See cases, pp. 11-13, *supra*. Considerations identical to those which impelled these decisions require the denial of such right to a riparian owner on the nonnavigable tributaries of a navigable river.

The paramount public interest in navigability, to which the owner of land bordering a navigable stream must yield his right to the flow of the river as in a state of nature, does not begin at the head of navigation. It extends back to the source of the waters which feed the river. Because of the indivisible relationship between the flow above the head of navigation and the state of navigability below, the power of the Federal Government to regulate commerce carries with it the right to control the non-navigable watershed of a navigable river (*Oklahoma v. Atkinson Co.*, 313 U. S. 508, 523; *United States v. Utah*,

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<sup>11</sup> For the proposition that the power of the Federal Government to improve the navigability of a river without liability to riparian owners is confined to its natural condition, the Court in the *Cress* case relied on *Monongahela Navigation Co. v. United States*, 148 U. S. 312, which has been explained in *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 89, as resting upon an estoppel arising out of its peculiar facts, and on *United States v. Lynah*, 188 U. S. 445, a case which in that aspect was expressly overruled in *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592, 597.



283 U. S. 64, 90), and prohibit any use of it which is detrimental to navigation. *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 709-710. The public interest in navigation imposes a servitude upon private rights in a *navigable* river so that the flow of the stream can be altered or destroyed without entitling the owner to compensation (*United States v. Chandler-Dunbar Co.*, 229 U. S. 53; see pp. 11-13, *supra*). The same public interest in navigation, from which stems the power of the Federal Government over the waters of the *nonnavigable* tributaries of navigable rivers, justifies the imposition of a like servitude upon the flow of such tributaries, superseding any private rights therein. The title to such tributary waters and to their flow can be only a "qualified title," subordinate to the powers of the Government to improve navigation; hence, the impairment of the value of those private rights through an improvement in navigation is not a taking of property but only "the exercise of a power to which that property has always been subject." (Cf. *United States v. Chicago, Milwaukee, St. Paul & Pac. Railroad Co.*, 312 U. S. 592, 597; *Scranton v. Wheeler*, 179 U. S. 141, 163.) Just as the Federal Government may prohibit without liability such use of the upper waters of a navigable stream as will adversely affect navigation below (*United States v. Rio Grande Irrigation Co.*, *supra*), so should it be

able without liability to diminish the value of the use made of such waters, by virtue of the incompatibility of such use with an improvement in navigability below.<sup>12</sup>

### III

#### THE IMPAIRMENT OF THE POWER HEAD OF RESPONDENT'S DAM IS A CONSEQUENTIAL INJURY AND NOT A TAKING WITHIN THE FIFTH AMENDMENT

Even if it be assumed that the use made of the flow of a stream is a property right paramount to the Government's powers over navigation, insofar as the right to compensation is concerned, the court below improperly awarded compensation because the incidental impairment of the power potential of a dam is not a "taking" under the Fifth Amendment. The only authority for the holding below in this aspect is *United States v. Cress*, 243 U. S. 316, which, it is respectfully submitted, is an anomalous decision, departing from the principles to which this Court has otherwise consistently adhered.

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<sup>12</sup> The question here discussed is different from that reserved in *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U. S. 266, *i. e.*, whether compensation for an actual taking of property on a nonnavigable stream should include power-site value despite the latent authority of the Government to forbid such projects. Here there is no actual taking, and the question relates to the effect of the present exercise of the Government's authority in a navigable stream itself.

To avoid the hardship which would follow from restricting the right to compensation under the Fifth Amendment to a "taking" which involves acquisition by the Government, this Court has found a "taking" where there is a permanent flooding of fast lands outside the bed of the river, or even permanent liability to intermittent but inevitably recurring overflows (*Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Cress*, 243 U. S. 316; see *Sanguinetti v. United States*, 264 U. S. 146, 148-149; *Jacobs v. United States*, 290 U. S. 13, 16; *United States v. Sponenbarger*, 308 U. S. 256, 267). But it has recognized that these cases represent the "extremest qualification" of the rule that no recovery will be allowed for consequential damages. See *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *United States v. Sponenbarger*, 308 U. S. at 265. Both the decision below and the *Cress* case go beyond these decisions in finding a "taking" in the impairment of the generating capacity of a dam through a change in the level of the waters of the tailrace. In the inundation of uplands there may justifiably be found an implied promise to pay for the value of the damaged lands, but no parallel reasoning will raise an implied promise to pay for the loss in the power potential of a dam by raising the water level of a navigable stream at a point miles away.

The impairment of respondent's operating power head caused by the building of a dam

thirty miles away would seem to be no less consequential in nature than the destruction of the value of a wharf by removing the river channel (*Gibson v. United States*, 166 U. S. 269); or injury to a riparian owner's right of access through erection of a pier (*Scranton v. Wheeler*, 179 U. S. 141); or impairment of drainage by raising the water level (*Mills v. United States*, 46 Fed. 738 (S. D. Ga.); *Lynn v. United States*, 110 F. (2d) 586 (C. C. A. 5); *United States v. Meyer*, 113 F. (2d) 387 (C. C. A. 7)); or subjection of levees to a greater burden (*Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Franklin v. United States*, 101 F. (2d) 459 (C. C. A. 6), affirmed on other grounds, 308 U. S. 516; *Ross Construction Co. v. Yearsley*, 103 F. (2d) 589 (C. C. A. 8), affirmed on other grounds, 309 U. S. 18); or destruction of the value of a coal tippie rendered useless by raising the level of a stream (*Kelley's Creek & Northwestern R. R. Co. v. United States*, 100 C. Cls. 396). In the *Gibson* case this Court quoted with approval as stating "the general rule upon the subject" a Pennsylvania decision (*Monongahela Navigation Co. v. Coons*, 6 Watts & Searg. 101 (Pa. 1843)) which held that the loss of waterhead through the backing up of a stream was "mere consequential damage." See also *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251; *Kockuk & Hamilton Bridge Co. v. United States*, 260 U. S. 125.

All these cases involved damage certainly more tangible and no further removed from the cause of the loss than the damage complained of at bar. To the extent that *United States v. Cress* allowed recovery for the destruction of the power potential of a dam through a rise in the level of a stream, it departed from the principles to which these cases give effect and is inconsistent with them. These principles, from which *United States v. Cress* is the only deviation, compel the conclusion, it is submitted, that the impairment of the flow of a tributary stream consequent upon a lawful change by the Government in the flow is not a compensable "taking" under the Fifth Amendment. *Gibson v. United States*, 166 U. S. 269; *Bedford v. United States*, 192 U. S. 217.

#### CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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JANUARY 1945.